Kassim bin Sulong & Ors v Guthrie Estates Holdings Ltd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–24–262 OF 1989
YAACOB ISMAIL J
1 JUNE 2001

Companies and Corporations *— Reconstruction — Entitlement to interests attributable to business operations of companies after reconstruction — All undertaking and assets of foreign companies to vest in local company — Entitlement to refund for double taxation payable by Inland Revenue to foreign companies under reconstruction exercise disputed — Whether liquidators of foreign companies could claim entitlement*

Prior to 31 January 1997, ten UK companies ('ten UK Ltds') of which the applicants were the liquidators of, owed plantations in Malaysia. In compliance with requirements of the New Economic Policy of Malaysia, a proposal was made to reconstruct the plantation interest of the ten UK Ltds. The reconstruction was carried out in the following way: (i) the ten UK Ltds went into voluntary liquidation and all their assets were distributed to Guthrie (M) Plantations Bhd ('GMP'). The process was called 'the ten first agreements'; (ii) GMP then entered into agreements with six Malaysian companies ('the six Sdn Bhds') to sell to the six Sdn Bhds certain of the assets ('the six second agreements'). All the estates that the ten UK Ltds owned in Malaysia were eventually transferred to the six Sdn Bhds. A dispute arose between the six Sdn Bhds and GMP as to the entitlement of West Malaysian Credit ('WMC'). The WMC, which arose pursuant to the provisions of Sch 9 of the Income Tax Act 1967, was attributable to the business operations of the ten UK Ltds.

Held:

(1) Pursuant to the ten first agreements, the whole of the undertaking and assets of each and every of the ten UK Ltds became vested absolutely and beneficially in GMP. It would follow that each of the ten UK Ltds entitlement to WMC would likewise have become vested absolutely and beneficially in GMP. Although as between the Inland Revenue and the ten UK Ltds it was the ten UK Ltds who would be entitled to receive WMC, the ten UK Ltds had by contract divested to GMP their entire corpus of the companies. Because of this and the fact that they stand possessed of the WMC as trustee, the liquidators of the ten UK Ltds could not claim the WMC for and behalf of the ten UK Ltds (see p 142E–G).

(2) From a legal point of view the WMC which was payable by the Inland Revenue, in the first instance to the ten UK Ltds, and subsequently to GMP was definitely an asset. There was a causal connection between the asset and the estate that led to the WMC being payable. Therefore as it was the plantation interests which

gave rise to the WMC entitlement, it was certainly an asset attributable to the estates (see p 143G–I).

(3) The intention of the restructuring under the New Economic Policy was to allow the ownership of the estates to pass from the hands of companies incorporated in England to those incorporated in Malaysia. If the plantation interests were intended to pass from the ten UK Ltds through GMP to the six Sdn Bhds, then likewise whatever was attributable to these interests should also pass. Having considered the submissions made in this application, the court found that the second to the seventh respondnets were entitled to the WMC currently being held by the applicants (see p 144A, I).

[**Bahasa Malaysia summary**

Sebelum 31 Januari 1997, sepuluh buah syarikat UK ('sepuluh UK Bhd') bagi yang mana pemohon-pemohon merupakan penyelesai-penyelesai, memiliki ladang-ladang di Malaysia. Dalam mematuhi kehendak-kehendak Dasar Ekonomi Baru Malaysia, satu cadangan telah dibuat untuk menyusun semula kepentingan sepuluh UK Bhd di dalam ladang tersebut. Penyusunan semula tersebut telah dijalankan menurut cara-cara yang berikut: (i) sepuluh UK Bhd tersebut memasuki penyelesaian secara sukarela dan semua aset mereka dibahagikan kepada Guthrie (M) Plantations Bhd ('GMP'). Proses tersebut dipanggil 'sepuluh perjanjian pertama'; (ii) GMP kemudiannya memasuki perjanjian-perjanjian dengan enam buah syarikat Malaysia ('enam Sdn Bhd tersebut') untuk menjual kepada enam Sdn Bhd tersebut aset-aset tertentu ('enam perjanjian kedua tersebut'). Semua estet yang dimiliki oleh sepuluh UK Bhd tersebut di Malaysia akhirnya dipindahmilik kepada enam Sdn Bhd tersebut. Satu pertikaian berbangkit antara enam Sdn Bhd tersebut dan GMP berhubung dengan hak ke atas West Malaysian Credit ('WMC'). WMC tersebut yang berbangkit selaras dengan peruntukan-peruntukan Jadual 9 Akta Cukai Pendapatan 1967, adalah hasil daripada operasi-operasi perniagaan sepuluh UK Bhd tersebut.

Diputuskan:

(1) Selaras dengan sepuluh perjanjian pertama tersebut, keseluruhan akujanji dan aset-aset setiap satu dari sepuluh UK Bhd tersebut menjadi terletakhak secara mutlak dan benifisial ke dalam GMP. Maka hak setiap satu daripada sepuluh UK Bhd tersebut kepada WMC akan begitu juga menjadi terletakhak secara mutlak dan benifisial dalam GMP. Walaupun antara Jabatan Hasil Dalam Negeri dan sepuluh UK Bhd tersebut ianya merupakan sepuluh UK Bhd tersebut yang akan berhak untuk menerima WMC, sepuluh UK Bhd tersebut telah melalui kontrak melepaskan kepada GMP keseluruhan korpus syarikat-syarikat tersebut. Disebabkan oleh hal ini dan hakikat bahawa mereka

tetap memiliki WMC sebagai pemegang amanah, penyelesai-penyelesai bagi sepuluh UK Bhd tersebut tidak boleh menuntut WMC untuk dan bagi pihak sepuluh UK Bhd tersebut (lihat ms 142E–G).

(2) Menurut pandangan dari sudut undang-undang WMC yang mana kena dibayar oleh Jabatan Hasil dalam Negeri, pertama kalinya kepada sepuluh UK Bhd tersebut, dan kemudiannya kepada GMP adalah tentunya merupakan suatu aset. Terdapat perhubungan kausa antara aset dan estet tersebut yang menyebabkan WMC menjadi harus dibayar. Oleh itu kerana ianya merupakan kepentingan-kepentingan ladang tersebut yang telah membangkitkan hak ke atas WMC, ianya sudah pasti merupakan suatu aset yang disebabkan oleh estet-estet tersebut (lihat ms 143G–I).

(3) Niat pembentukan semula di bawah Dasar Ekonomi Baru adalah untuk membenarkan hak keempunyaan estet-estet tersebut beralih daripada tangan syarikat-syarikat yang diperbadankan di England kepada yang diperbadankan di Malaysia. Jika kepentingan ladang-ladang tersebut diniatkan untuk beralih daripada sepuluh UK Bhd tersebut melalui GMP kepada enam Sdn Bhd tersebut, maka begitu juga apa yang menyebabkan kepentingan-kepentingan ini haruslah beralih juga. Setelah mempertimbangkan hujahan-hujahan yang dibuat dalam permohonan ini, mahkamah memutuskan bahawa responden-responden kedua hingga keenam berhak kepada WMC yang ketika ini dipegang oleh pemohon-pemohon (lihat ms 144A, I).]

Notes

For cases on companies and corporations generally, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1–1151.

Cases referred to

Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587 (refd)

Independent Automatic Sales Ltd & Anor v Knowles & Foster [1962] 1 WLR 974 (refd)

Prenn v Simmonds [1971] 1 WLR 1381 (refd)

Legislation referred to

Companies Act 1965 s 274
Income Tax Act 1967 Sch 9
Income Tax Ordinance 1947

Visnu Kumar (*Rashid & Lee*) for the applicants.

Robert Lazar (*Goh Ka Im* with him) (*Shearn Delamore & Co*) for the second to seventh respondents.

Vinayak Pradhan (*Skrine & Co*) for the eighth and ninth respondents.

Yaacob Ismail J:

Application

This application by the liquidators of several plantations incorporated in the UK for the following directions pursuant to s 274 of the Companies Act 1965 to enable the liquidators to discharge their duties:

(a) as to the ultimate beneficiary of the West Malaysia Tax Credit of RM10,109,127.60 payable to the said liquidators pursuant to Schedule 9 to the Income Tax 1967;

(b) that the parties be at liberty to apply;

(c) that the costs of this application be provided for;

(d) for any further directions.

Facts

Prior to 31 January 1997, ten UK companies namely United Temiang (FMS) Rubber Estate Ltd, The United Sua Betong Rubber Estates Ltd, Rembau Jelei Rubber Ltd, Port Dickson-Lukut Rubber Estates Ltd, Oil Palms of Malaya Ltd, The Malacca Rubber Plantations Ltd, Linggi Plantations Ltd, Ladang Bahru Limited, Labu Cheviot Rubber Ltd, The Kamuning (Perak) Rubber and Tin Company Ltd ('the ten UK Ltds'), of which the applicants are now the liquidators of, owned plantations in Malaysia and accordingly were carrying on business in Malaysia as owners of such estates. The ten UK Ltds were however incorporated and resident in the United Kingdom.

In compliance with the requirements of the New Economic Policy of Malaysia, a proposal was made to reconstruct the plantation interests of the ten UK Ltds. The reconstruction was carried out in the following way:

(a) The ten UK Ltds which owned the plantations in Malaysia went into voluntary liquidation and all their assets were distributed in specie to Guthrie Malaysia Plantations Bhd (GMP), of which the 8th and 9th respondents are the liquidators of. This process is covered by what has been called 'the ten first agreements' entered into by each of the ten UK Ltds with GMP and the terms of each agreement are almost identical.

(b) GMP then entered into agreements with six Malaysian companies namely Kumpulan Tebong Sdn Bhd, Kumpulan Jelei Sdn Bhd, Kumpulan Linggi Sdn Bhd, Kumpulan Sua Betong Sdn Bhd, Kumpulan Temiang Sdn Bhd, Kumpulan Kamuning Sdn Bhd ('the six Sdn Bhds') to sell to the Sdn Bhds certain of the assets. This agreement is referred to in the 'the six second agreements' which are to be found at pp 43–106 of Bundle 'A'. Except for the reference to individual estates, and bank account details, each of the six second agreements are identical in form and substance.

In short, all the estates that the ten UK Ltds owned in Malaysia were eventually transferred to and ended in the hands of the six Sdn Bhds together with certain other assets and liabilities. GMP was the medium by which this process took place.

The dispute that has arisen, essentially between the six Sdn Bhds and GMP, relates to the entitlement to what has been called the 'West Malaysia Credit ('WMC') which arose pursuant to the provisions of Sch 9 of Income Tax Act 1967. WMC is basically the amount of money to be refunded by the Inland Revenue authorities to a person, for the double tax paid by the person which in this case is a company, which had commenced business prior to 1967 while income tax was charged under the Income Tax Ordinance 1947, the taxing statute prior to the Income Tax Act 1967.

The WMC, in this case, is exclusively attributable to the business operations of the ten UK Ltds, that is, their plantation business in Malaysia.

Issue

A total sum of RM10,109,127.60 was attributed to be payable to the ten UK Ltds. It is as a result of the reconstruction, and the ten first agreements and the six second agreements, that there has arisen this dispute as to who is entitled to the WMC.

Findings

Pursuant to the ten first agreements, the ten UK Ltds transferred to GMP 'the whole of the undertaking and assets of the company to the intent that the same shall become vested absolutely and beneficially in GMP in satisfaction of GMP shareholding in the company.' Therefore, as the whole of the undertaking and assets of each and every of the ten UK Ltds become vested absolutely and beneficially in GMP, it will follow that each of the ten UK LTDS' entitlement to WMC will likewise have become vested absolutely and beneficially in GMP upon the entering into of the ten first agreements.

Although as between the Inland Revenue and the ten UK Ltds, it was the ten UK Ltds who would be entitled to receive the WMC, the ten UK Ltds have by contract divested to GMP of the companies in question. Because of this and the fact that they stand possessed of the WMC as trustee, the liquidators of the ten UK Ltds cannot claim the WMC for and on behalf of the ten UK Ltds.

Under the six second agreements entered into between GMP and each of the six Sdn Bhds, GMP as vendor, agreed to sell and the six Sdn Bhds as purchasers agreed to purchase on 'a going concern basis' that part of its undertaking which consists of the assets referred to in Schedule 1 as at midnight on 31 January 1977. Schedule 1 of each of the six second agreements sets out the specified assets which have been sold by GMP to the six Sdn Bhds. Item 5 of Sch 1 refers to 'all book debts … due in respect of the estates to the persons beneficially entitled to the estates immediately

prior to their acquisition by the vendor.' Was the WMC a debt falling under item 5 Sch 1?

A debt exists when a certain sum of money is owing from one person, the debtor, to another, the creditor.

In the case of *Independent Automatic Sales Ltd & Anor v Knowles & Foster* [1962] 1 WLR 974 at p 984, Buckley J had this to say with regards to a hire purchase agreement:

> When he signs the agreement the hirer, comes under a firm obligation to pay at least that amount. To this extent he becomes liable as soon as the agreement is binding upon the parties for a debt *debitum in praesenti* although in part *solvendum in futuro*, and to this extent at least the hirer's indebtedness to the company could (and, I think, would) in the ordinary course of a business of this character be entered in well-kept books of the business. If this is right, debts under the agreements already existed at the date of the deposit although they were not due to be paid until later. The fact that they were not then immediately payable would not make them any, the less debts nor, in my judgment, any the less book ebts.

Even before the execution of these agreements, the particulars of the WMC payable to six out of the ten UK Ltds were made available and the amounts ascertained.

Mr Geh Cheng Hooi, a liquidator of GMP, gave evidence to the effect that WMC is not entered in the balance sheet of any company. He further stated that although it would not be entered in the balance sheet of a company as a book debt it would be mentioned in the notes to the audited accounts. This is done to enable a shareholder reading the accounts to be aware that WMC would be payable after 1 January 1988.

The WMC was due in respect of the estates because it was the economic activity generated by the estates that gave rise to the payment of WMC. The persons beneficially entitled to the estates would be the ten UK Ltds. From the Inland Revenue's perspective, the WMC would in the first instance have been due to the ten UK Ltds.

Item 10 of Sch 1 of the six second agreements deals with all other assets attributable to the estates. An 'asset' has been defined as property available for the payment of the debts of a person or corporation (see *Jowitt's Dictionary of English Law*). From a legal point of view, the WMC which is payable by the Inland Revenue, in the first instance to the ten UK Ltds, and subsequently by the 10 GMP is definitely an asset.

The word 'attributable' has been defined in *Stroud's Judicial Dictionary* (5th Ed) Vol 1 at p 223 as: for a result to be 'attributable' to anything it must be wholly, or in material part, caused by that thing.

There is definitely a causal connection between the asset and the estate, because it is the very operation of the estates that led to the WMC being payable. Therefore, as it is the plantation interests which gave rise to the WMC entitlement, it is certainly an asset that is attributable to the estates.

The intention of the restructuring under The New Economic Policy was to allow the ownership of the estates to pass from the hands of companies incorporated in England to those incorporated in Malaysia. If the plantation interests were intended to pass from the ten UK Ltds through GMP to the six Sdn Bhds then, likewise whatever is attributable to these interests should also pass.

It is to be noted that in addition to the specified assets contained in Schedule 1 of the six second agreements, the six Sdn Bhds in consideration also undertook the specified liabilities in Schedule 2 of the same agreements. These liabilities include all creditors, retirement gratuity provisions and accrued charges attributable to the estates, and in proportion, a certain amount of the liability of the ten UK Ltds for Malaysian and United Kingdom taxation. The six Sdn Bhds should be entitled to what is due in respect of the plantation interests.

In relation to the construction of agreements, in the case of *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) at pp 1383–1384, Lord Wilberforce said:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners v Adamson* (1877] 2 App Cas 743 at p 763 provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v Longbottom* 1 E & E 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.

In *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587, the court of appeal held, amongst others:

> (3) Where a contract is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous, the court may imply a term in order to uphold the transaction.
>
> (5) A court's power to imply a term in a contract forms part of its interpretative jurisdiction.

In this case, in so far as Inland Revenue is concerned it is the ten UK Ltds who will be entitled to the WMC. The ten UK Ltds then transferred it, by contract, to GMP who in turn have transferred it, by contract to the six Sdn Bhds.

Conclusion

Having considered the submissions made in this application, it is my view that the second to seventh respondents are entitled to the West Malaysia Credit currently being held by the applicants. I also ordered costs to be

paid by first respondent to second to seventh respondents and to the applicants.

Order accordingly.

Reported by Jafisah Jaafar